STATEMENT

This is an appeal from the judgment of a three-judge district court which enjoined the enforcement of the part of an order ("Order") entered by the Interstate Commerce Commission ("Commission") which prescribed car service rules 1 and 2, adopted by the railroad members of the American Association of Railroads ("AAR") as guidelines for the loading and disposition of foreign cars,[2] for mandatory observance by all railroads designated by the Commission as parties to its proceeding.[3] The mandatory imposition of these rules, which, in essence, require that foreign cars be loaded or sent empty to or toward the lines of the owners of such cars, was the only part of the Order challenged below.[4]

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[2] So-called "foreign cars" are cars belonging to a railroad (hereafter "owning line") that are temporarily located on the lines of another railroad.

[3] All Class I railroads and a selected group of Class II railroads and switching and terminal companies were named by the Commission as respondents in its order initiating the investigatory portion of its proceeding, Docket Ex Parte No. 241. 29 Fed. Reg. 119 (1964). However, many short-line railroads and switching lines were not so designated, were not parties to the proceeding and will not be bound by the Commission's Order.

[4] Car Service Rules 1 and 2 are as follows:

"*Rule 1* Foreign cars, empty at a junction with the home road, must be:

(a) Loaded at that junction to or via home rails, or,
(b) Delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

Rule 2 Foreign empty cars other than those covered in Rule 1 shall be:

(a) Loaded to or via owner's rails.
(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading)
(c) Delivered empty to the home road at any junction subject to Rule 6.

[Footnote continued on page 3]

The administrative proceedings were begun in December of 1963 when the Commission undertook to study "the adequacy of railroad freight car supply with related subjects such as utilization, distribution, rules and practices being left to a later stage . . . ." 29 Fed. Reg. 119 (1964). That initial phase ended in June of 1964 when the Commission announced "the existence of a substantial inadequacy of ownership in more than one category of freight cars throughout the United States." 323 I.C.C. 48, 60 (1964).

In July of 1964, the Commission issued a formal notice of proposed rule making under § 1(14)(a), among others, of the Interstate Commerce Act, 49 U.S.C. § 1 (14)(a) (Supp. V), and broadened the inquiry into a general investigation of all phases of freight car ownership and use, looking toward "the prescription of rules designed to alleviate the problem . . . ." 29 Fed. Reg. 11653, 11654 (1964). During the course of this proceeding, a Commission witness proposed that certain car service rules, including rules 1 and 2, be prescribed for mandatory observance. The introduction of that proposal markedly altered the character of the proceedings. As both railroads and shippers recognized, mandatory observance of car service rules 1 and 2 would seriously

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[4] [Continued]

(d) Delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

(e) Return empty to the delivering road when handled only in switching service." App. C, 156-57.

In addition to prescribing mandatory observance of these car service rules, the Commission's Order required the respondent railroads to prepare annual reports showing the results of an application of certain data to a car ownership formula approved by the Commission and further showing the steps, if any, taken to cure any indicated inadequacies.

disrupt both production and distribution capabilities of many shippers, including those of the present appellees.[5] Thus, in response to the proposal for mandatory observance of car service rules, at least 20 major shippers and shippers' organizations, including the present appellees, intervened in the proceeding and submitted evidence in opposition to the proposal.[6]

Following the receipt of evidence in the form of verified statements and replies, the proceeding was referred to a hearing examiner for the taking of testimony and cross examination. The hearing lasted approximately 50 days and produced nearly 6,000 pages of testimony. Thereafter, the Hearing Examiner prepared his recommended report and order in accordance with section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (1971). Following a careful review of all record evidence, he made a general finding that "mandatory rules would be of substantial detriment to rail carriers and shippers." App. A, 23.[7] As to the steel industry in particular, the Examiner found that the "necessary increase in switching would exceed the physical capabilities of [many plants] and [their] serving carriers beyond the point of rectification" and that, with respect to the forecasting of shipments that would be required by the rules, "the steel companies would be faced with a requirement impossible to meet." App. A, 23. He concluded his extensive report as follows:

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[5] As the district court observed: "Because the shippers and railroads normally are adversaries in Commission proceedings, that they are virtually united in opposing the mandatory rules is a phenomenon not without significance." App. A, 22.

[6] Initially, the only active participants in the proceeding were the respondent railroads, the American Short Line Railroad Association, the Secretary of Agriculture, the Public Utility Commissioner of Oregon, five shippers' organizations and Vulcan Materials Company. App. C, 30.

[7] The Jurisdictional Statement will be cited herein as "J.S. ——", and the Appendices to the Statement as "App. ——, ——".

> "Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified." [8]

Of all of the participating parties, only the Commission's Bureau of Enforcement filed exceptions to the Hearing Examiner's finding that prescription of car service rules for mandatory observance was not justified.[9] Nonetheless, Division 3 of the Commission, on August 19, 1969, issued a Report prescribing these car service rules for mandatory observance. App. C. Beginning with the premise that there existed a chronic shortage of general purpose freight cars—a premise which the Hearing Examiner had found was not supported by the evidence—the Commission concluded that the remedy for this shortage lay in prescribing car service rules, including rules 1 and 2, for mandatory observance. App. C, 87-88. In doing so the Commission recognized that imposition of these rules would not improve the utilization of freight cars "except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner." App. C, 65. The Commission also recognized that its order would exascerbate car shortages on car-poor roads, but nevertheless held that the needs of shippers thereby deprived of access to rail transportation "should not be met with equipment of carriers which obtained the cars to serve other shippers." App. C, 66.

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[8] Hearing Examiner Report, 63.

[9] In addition to the Bureau of Enforcement, only two other parties (National Industrial Traffic League and Vulcan Materials Company) filed any exceptions to the Hearing Examiner's Report. App. B, 31-32.

After exhausting their administrative remedies,[10] the appellee steel companies and the Institute brought suit in the Western District of Pennsylvania to review the portion of the Commission's Order requiring mandatory observance of car service rules 1 and 2. The AAR, the National Industrial Traffic League and the National Association of Shippers Advisory Boards intervened as plaintiffs. After the submission of extensive briefs and oral argument, the court, on March 18, 1971, entered an order making permanent an interlocutory injunction previously issued, restraining the Commission from enforcing that part of its Order that had been subject to review.[11]

The court below accepted *arguendo* the Commission's conclusion that a shortage of general purpose freight cars existed. Nonetheless, it enjoined the enforcement of compulsory car service rules for two reasons. First, the court concluded that the Commission had utterly failed to set out findings upon which mandatory observance of car service rules 1 and 2 was, or could be, based;[12] and second, the court held that the rules, when prescribed

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[10] A timely Petition for Reconsideration was filed on November 3, 1969 and a Petition for Further Postponement of the Effective Date of the Order of the Commission was filed on June 3, 1970. The relief requested in these pleadings was denied by orders of the Commission dated February 18, 1970 and June 30, 1970, respectively. In the process of reconsideration, the Commission postponed the effective date of its Order and provided for certain limited exceptions to mandatory observance of rules 1 and 2. *See* App. D, 172-74.

[11] Subsequently, a three-judge district court for the Middle District of Florida upheld the Commission's Order. *Florida East Coast Ry.* v. *United States*, 327 F. Supp. 1076 (1971). The Florida court considered not only the Commission's prescription of car service rules 1 and 2 for mandatory observance but also its adoption of a car ownership formula. *See* n. 4, *supra*.

[12] The court did not, therefore, reach the question whether there was substantial evidence to support the Commission's Order, particularly in view of the contrary findings of its Hearing Examiner, *cf.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

for mandatory observance were not "reasonable" within the meaning of section 1(14)(a) of the Interstate Commerce Act, not only because of this absence of findings, but also because of the fact, conceded by Commission witnesses, "that there cannot be more than 80 per cent enforcement of regulations, the violation of which carries criminal penalties." App. A, 25.

ARGUMENT

1. The decision of the court below does not present any important issue of federal transportation law.[13] It does not question either the power of the Commission to cure car shortages through the prescription of reasonable car service rules, or, indeed, the merits of car service rules 1 and 2 themselves. To the contrary, the court below set aside the Commission's Order for two reasons, each of which is wholly unrelated to the existence *vel non* of a car shortage. First, the court held that the Commission had failed to articulate any findings that would support the imposition of compulsory car service rules. Second, the court concluded that because compliance with the rules was not possible, and noncompliance would be a criminal offense, the rules, when prescribed for mandatory observance, were not "reasonable." The court's decision with respect to these issues is plainly correct and should be summarily affirmed.

a. The purpose of the Commission's proceeding was to consider "the prescription of rules designed to alleviate the [freight car shortage] problem . . . ." 29 Fed. Reg. 11653, 11654 (1964). At the conclusion of its investigation, the Commission, disregarding the careful

[13] The Government stresses here the "seriousness of the current freight car shortage" that "plague[s] the nation." J.S. 8-9. But its argument in this respect is irrelevant to its request that the decision below be reviewed. That decision does not challenge the Commission's finding of a chronic car shortage. *See* App. A, 19.

findings of its Hearing Examiner that mandatory car service rules "would be of substantial detriment to rail carriers and shippers" and that they had "not been shown to be justified" (App. A, 23, 15), ordered the prescription of a set of car service rules, including rules 1 and 2, for mandatory observance. Although the Commission gave several explanations for its action, it failed to make findings to support that action.

First, the Commission asserted that returning cars to their owners would improve utilization by enabling those owners to provide for the needs of their shippers. App. C, 65. However, a necessary predicate for that conclusion is that the freight car needs of the shippers on those lines are greater than the needs of shippers on non-owning lines. Or, as the district court stated it, that "the shortage was more acute on the owner lines." App. A, 19. But there is no finding of such a greater shippers' need or greater car shortage on the owning lines.[14]

Second, the Commission reasoned that requiring the return of cars to their owners would

> "shift the responsibility for shortages to the railroad with inadequate ownership and compel such a railroad to increase its fleet . . . ." App. C, 65.

But there is no finding by the Commission that roads to whom the responsibility will be shifted are or would be financially capable of increasing their ownership of freight cars.[15] Nor is there any finding as to the effect

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[14] As to the absence of such a finding the Government now erroneously argues that the "issue was never raised before the Commission, and thus was not properly before the district court." J.S. 9. In fact, this issue was raised before the Commission. *See, e.g.*, Appellees' Petition for Reconsideration, dated Nov. 3, 1969, at 15; AAR Petition for Reconsideration, dated Nov. 3, 1969, at 13, 84.

[15] Indeed, the General Counsel for the Commission responded negatively to a question posed on oral argument by the court

upon shippers—in the form of increased rates—of the cost of such increased ownership—in the form of capital expenditures.

Third, the Commission explained that "[a]lthough mandatory observance of these two rules may create shortages on roads which own insufficient equipment, . . . the needs of shippers affected *should not* be met with equipment of carriers which obtained the cars to serve other shippers." App. C, 66 (emphasis added). But there are no findings as to which shippers will be so affected or the extent to which they will be disadvantaged by having their needs subordinated to the undetermined needs of shippers on car-rich lines. Moreover, the Commission's statement assumes—without finding—that there is a greater public interest in returning freight cars to the lines of their owners than there is in promptly moving freight awaiting shipment.

Finally, the Commission did not even make findings with respect to the benefit to be derived from its "affirmative, remedial action," other than to say that car service rules bear indirectly on the adequacy of the freight car supply. Most startling is the absence of a finding that mandatory observance of car service rules 1 and 2 will *in fact* alleviate the inadequacies of ownership that the Commission found to exist.

This case is thus much like *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C. 1947). There the Commission had prescribed certain penalty per diem charges whose purpose—like the purpose of the rules here prescribed by the Commission—was to require the return of foreign cars to the owning lines. In an opinion by Judge Prettyman, the court set aside the order on grounds directly applicable here:

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below as to whether there is "testimony on the record indicating the capacity of railroads to increase their fleets and to provide better maintenance for their cars?" Tr. Oral Arg. p. 13.

> "But, even if the Commission had the power it claims, the findings in its report are insufficient to support its order. We have examined the report with care, in an effort to find the obviously requisite determinations. There is no finding that the public interest in the return of cars to the owning railroads outweighs the public interest in the prompt movement of freight awaiting shipment at the initial unloading point of the car. There is no finding that an increase in the per diem would cause the return of a single car to its owner. There is no finding that in times of car shortage the necessities of non-owning railroads are less than those of the owning railroads. There is no finding that the present need for cars is on the owning roads rather than on the hiring roads. There is no finding that the roads which serve the large crop areas are owning roads. There is no finding as to what freight needs immediate movement." 75 F. Supp. at 75.

As this Court has recognized, the requirement that an agency make appropriate findings is not imposed "to insist on formalities and to burden the administrative process with ritualistic requirements." *Yonkers* v. *United States*, 320 U.S. 685, 692 (1944). Rather, it rests upon a recognition that

> "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted *be clearly disclosed and adequately sustained.*" *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (emphasis supplied).

This means that an "agency must make findings that support its decision and those findings must be supported by substantial evidence." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962).

Having held that in this case the Commission failed to make the necessary findings, the district court did not

reach the question of whether there was substantial evidence in the record to support any such findings. Its conclusion as to the absence of findings is clearly correct.

Nor can the absence of findings be overcome by blind reliance on the expertise of the Commission or, as the Government states it, by the "Commission's policy determination." J.S. 9. Otherwise, as this Court has recognized in *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87, 92 (1968):

> "The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming '"a monster which rules with no practical limits on its discretion."' *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act."

See also Schaffer Transportation Co. v. *United States*, 355 U.S. 83, 92 (1957).

b. The second ground for the decision of the court below was that car service rules 1 and 2, when prescribed for mandatory observance, are not "reasonable." In reaching that conclusion, the court relied not only upon the absence of findings and the failure of the Commission to demonstrate a rational connection between the asserted problems of car shortage and the proposed solution, but more specifically upon the Commission's acknowledgment that railroads and shippers cannot comply with the rules. Clearly a mandatory rule that cannot be complied with is not "reasonable." *See Iversen* v. *United States*, 63 F. Supp. 1001, 1006 (D.D.C.), *aff'd per curiam*, 327 U.S. 767 (1946).

The Commission's acknowledgment of the impossibility of compliance with rules 1 and 2 correctly reflects the

uncontradicted record evidence. This evidence was summarized by the Hearing Examiner as follows:

> "[A]ll of the Bureau witnesses agreed that perfect compliance with car service rules is impossible. One of [these] witnesses was of the opinion that compliance with the first four car service rules proposed would be good if it was made in 80 per cent of the instances those rules were applicable. In view of such opinion the witness believes that the proposed car service rules should be administered with 'strictly controlled flexibility.' The latter concept may beguile the imagination but it does not provide a comprehensible standard of enforcement." App. A, 24.

The lack of a comprehensible standard of enforcement is all the more disturbing where, as here, failure to comply with the Commission's Order carries with it criminal penalties.[16] Although such unpredictability in the application of criminal statutes is a defect of constitutional proportions, *see, e.g., United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921), the court below did not decide the constitutional question. It did, however, advert to its "concerns about the ascertainable standard of guilt" in determining the "reasonableness of the proposed regulation." App. A, 25. Because carriers and shippers will be unable to comply with the rules, and their failure to comply will subject them to criminal penalties, the court's decision that the Commission's Order was not "reasonable" was clearly correct.[17]

2. There is no conflict of decisions requiring plenary review and resolution by this Court. As the Government

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[16] *See* Elkins Act, 49 U.S.C. § 41(1) (1964). *See also* 49 U.S.C. § 1(17) (1964) (penalty for carrier violations of car service rules); 49 U.S.C. § 10 (1964) (misdemeanor penalty for carrier violations).

[17] The Government does not deny that compliance with the Commission's Order is impossible. Rather, it suggests that this defect is cured by the availability of Commission—provided exceptions. *See* n. 10, *supra*. Even if the Commission were equipped to handle requests for exceptions in 20% of all car loadings each day, enforce-

correctly points out, a three-judge district court for the Middle District of Florida has, by upholding the Order here at issue, reached a result contrary to that reached by the court below. The conflict does not, however, give rise to any uncertainty as to whether mandatory observance of rules 1 and 2 is required of either carriers or shippers. The court below enjoined the Commission from enforcing these rules. That injunction establishes a uniform rule of national application. There is thus no possibility that the Commission's Order may be enforced in some locales but not in others.[18]

Nor is there any conflict on "important issues of federal transportation law." J.S. 8. As discussed above, the court below enjoined enforcement of the Commission's Order on the grounds (1) that the Commission failed to articulate findings to support its order; and (2) that rules 1 and 2, when prescribed for mandatory observance, were not "reasonable" where compliance with those rules is impossible. As to the first, the Florida court examined the Commission's Order only insofar as it was necessary to determine whether the Commission's "action was based on *substantial evidence*." App. F, 199 (emphasis added). The Florida court did not consider whether the Commission had made *findings* sufficient to support its Order. The fact that the Florida court adopted a restric-

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ment of the rules, as the court below found, would be "dependent upon a subjective determination of the field representatives of the Commission," App. A, 25. Accordingly, a carrier or shipper would not know *in advance* whether, as a practical matter, it would be necessary to seek an exception. *See Watkins* v. *United States*, 354 U.S. 178, 208 (1957).

[18] It should be noted that even if the decision below were reversed and the Commission's Order were permitted to take effect, car service rules 1 and 2 would not be "uniformly applied to all roads . . ." (J.S. 7), for contrary to the Government's assertion, the rules do not apply to "all the nation's railroads." *Ibid.* As noted, *supra*, n. 3, many railroads were not parties to the Commission proceeding and would not be bound by its Order.

tive approach to judicial review [19]—an approach that is inconsistent with the language of the Administrative Procedure Act and the holdings of this Court—hardly creates a conflict with the court below on an important issue of federal transportation law. And, the Florida court, by assuming that Commission-provided exceptions cured the admitted impossibility of compliance problem, never reached the alternative basis of the decision below—that rules with which compliance is not possible are not "reasonable," especially when noncompliance constitutes a violation of a criminal statute. Thus, this is not a situation in which "there is a real and embarrassing conflict of opinion and authority between the . . . courts" requiring consideration and resolution by this Court. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Finally, it should be noted that affirmance of the decision below will not in any way hamper the Commission in its efforts to remedy any car shortage problem it finds. By Commission order the record in this proceeding is still open. App. C, 88. The Commission is free at any time to reconsider the evidence now of record and make such findings to support its order as that evidence will permit. If the evidence of record is not sufficient to support the necessary findings, the Commission is free to receive additional evidence. Thus, there is no need to take the time of this Court when the Commission itself has ample power to correct the deficiencies found by the court below.

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[19] *See, e.g.*, App. F, 198-199.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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